

) **BEFORE THE CHIEF PROCUREMENT OFFICER**  
)  
)  
) **DECISION**

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter of protest from Walker Brothers, Inc. (Walker). With this invitation for bids (IFB), the Materials Management Office (MMO) attempts to procure a statewide term contract for traffic signal controllers. Traffic controllers are the intelligent systems that coordinate signal light operation at roadway intersections. MMO listed twenty-one component parts of traffic controllers and asked the bidders to bid each item separately with the intention of awarding each item separately. After receiving the evaluation of the bids and consulting with highway safety engineers of the South Carolina Department of Transportation (SCDOT), MMO issued a Statement of No Award announcement due to:

- Price excessive: No award is made on all item(s). Price is considered excessive.
- Resolicit items – All items will be re-solicited with revised specifications.

A "No Award" is issued when the procuring agency decides not to proceed with award of a solicitation.

In its letter, Walker protested MMO's "No Award" for the solicitation alleging, "Walker Brothers feels that we complied with the terms of the bid. The prices for goods and services were in line with what you having been paying for the last four and half years. We officially protest the decision to not award the bid."

In order to resolve the matter, the CPO conducted a hearing October 13, 2009. Appearing before the CPO were Walker, represented by Billy Walker, Esq. and MMO, represented by John Stevens, State Procurement Officer. Representatives of SCDOT, the primary customer for the statewide term contract, attended the hearing, but did not advocate a case.

### **NATURE OF PROTEST**

The letter of protest is incorporated herein by reference.

### **FINDINGS OF FACT**

The following dates are relevant to the protest:

1. On April 3, 2009, MMO issued the IFB. [Ex. 1]
2. On April 27, 2009, MMO issued Amendment # 1. [Ex. 2]
3. On May 7, 2009, MMO issued Amendment # 2. [Ex. 3]
4. On May 28, 2009, MMO opened five bids received. [Ex. 4]
5. On June 18, 2009, David Rawl, Deputy Director of SCDOT Procurement, asked Gary Hodgins, MMO Senior Procurement Manager, to "no-award the controller solicitation and rebid." [Ex. 6]
6. On July 6, 2009, Mr. Hodgins posted a Statement of No Award. [Ex. 7]
7. On July 21, 2009, the CPO received Walker's protest.

### **CONCLUSIONS OF LAW**

On June 18, 2009, PJ Farmer, SCDOT Traffic Engineering, in an email to David Rawl, SCDOT Deputy Procurement Director, wrote, "We would like to request a re-bid of the above solicitation on 3 grounds; excessive pricing for item 1, changes to the specification for items 1, 3, 4, and 12, and the regrouping of all items into 1 Lot. Having all items in 1 lot will allow us to award to multiple vendors with the lowest 'lot' pricing." [Ex. 6] Mr. Rawl forwarded the email to Gary Hodgins, MMO Senior Procurement Manager, stating, "Based on the PJ's recommendation we would like to no-award the



controller solicitation and rebid using the attached specs.” Mr. Hodgin cancelled the solicitation by issuing a Statement of No Award on July 6, 2009 for the previously stated reasons, and Walker protested the “No Award.”

The South Carolina Consolidated Procurement Code (the Code) allows the State to “No Award” a solicitation. It reads, “Any solicitation under this code may be cancelled, or any or all bids or proposals may be rejected in whole or part as may be specified in the solicitation, when it is in the best interest of the State. The reasons for rejection, supported with documentation sufficient to satisfy external audit, shall be made a part of the contract file.” [SC Code Ann. § 11-35-1710] The accompanying State Budget and Control Regulation 19-445.2065 on rejection and cancellation of bids reads in part:

A. Unless there is a compelling reason to reject one or more bids, award will be made to the lowest responsible and responsive bidder. Every effort shall be made to anticipate changes in a requirement prior to the date of opening and to notify all prospective bidders of any resulting modification or cancellation, thereby permitting bidders to change their bids and preventing the unnecessary exposure of bid prices. As a general rule after opening, an invitation for bids should not be canceled and readvertised due solely to increased quantities of the items being procured; award should be made on the initial invitation for bids and the additional quantity required should be treated as a new procurement.

B. Cancellation of Bids Prior to Award.

(1) When it is determined prior to the issuance of an award or notification of intent to award, whichever is earlier, but after opening, that the requirements relating to the availability and identification of specifications have not been met, the invitation for bids shall be cancelled. Invitations for bids may be cancelled after opening, but prior to award, when such action is consistent with subsection A above and the procurement officer determines in writing that:

- (a) inadequate or ambiguous specifications were cited in the invitation;
- (b) specifications have been revised;
- (c) the supplies, services, information technology, or construction being procured are no longer required;
- (d) the invitation did not provide for consideration of all factors of cost to the State, such as cost of transporting state furnished property to bidders' plants;

- (e) bids received indicate that the needs of the State can be satisfied by a less expensive article differing from that on which the bids were invited;
- (f) all otherwise acceptable bids received are at unreasonable prices;
- (g) the bids were not independently arrived at in open competition, were collusive, or were submitted in bad faith; or
- (h) for other reasons, cancellation is clearly in the best interest of the State.

(2) Determinations to cancel invitations for bids shall state the reasons therefor.

Further, the IFB provides for the State to cancel the solicitation. It reads, "The State may cancel this solicitation in whole or in part. The State may reject any or all proposals in whole or in part." [Ex. 1, p. 7, Rejection/Cancellation]

During the hearing, Walker argued that it was inappropriate to cancel the solicitation because the prices offered were not excessive and that the State lacked any valid reason to cancel.

#### **DETERMINATION**

Walker argued that the State had no compelling reason to reject all bids and cancel the solicitation. However as noted above, the Code clearly allows the State to cancel a solicitation under certain circumstances. To reiterate, the reasons stated by Mr. Hodgin were:

- (A) Price excessive: No award is made on all item(s). Price is considered excessive.
- (B) Resolicit items – All items will be re-solicited with revised specifications.

Both reasons are authorized under the Code and the Regulations section quoted above. Specifically, relevant conditions recognized by Regulation 19-445.2065 are:

- (e) bids received indicate that the needs of the State can be satisfied by a less expensive article differing from that on which the bids were invited;
- (f) all otherwise acceptable bids received are at unreasonable prices; and,
- (b) specifications have been revised.



The Code also establishes the standard for review of a determination to cancel a solicitation without award. Section 11-35-2410(A) on the Finality of Determinations reads: "The determinations required by the following sections and related regulations are final and conclusive, unless clearly erroneous, arbitrary, capricious, or contrary to law . . . Section 11-35-1710 (Cancellation of Invitation for Bids or Requests for Proposals)."

Mr. Dan Campbell, SCDOT Signal Systems Engineer, testified that his decision that all prices offered were excessive was based upon his research of prices for similar equipment being paid by other states. He stated that a bidder offered the State of North Carolina a price of \$1,800 per controller with software (Bid Item #1) compared to the lowest price offered the State of South Carolina of \$4,083.83.

Walker argued that the bid to North Carolina offered different software than that currently used as the standard for traffic controllers in South Carolina. Walker argued that the technology was untested and that it would be a poor economical decision for the State since SCDOT owns the rights to the current standard software, having paid \$200,000 for licenses.

Mr. Campbell responded that all traffic controller software must meet Type 170, CALTRAN specification, which requires that "everything is interchangeable." He stated that testing of the alternate software is underway in the States of North Carolina, Georgia, New York and Texas and stated that Spartanburg is using the alternate software now. According to Mr. Campbell, SCDOT wishes to consider the alternate software.

Furthermore, Mr. Campbell also testified that he had intended for all items to be awarded as one lot. He worried that line item awards would cause confusion among traffic safety personnel and contractors tasked with repairing traffic signals. He stated that he "never intended to award by line item" when he submitted the request to MMO. He argued that awards by line item would result in numerous awards to various bidders that would create confusion for SCDOT traffic safety officials in



determining the parts required for any repair and then determining the appropriate contractor for each part needed, which could affect the speed with which SCDOT could respond to traffic signal malfunctions. He argued that awarding by entire lots all parts required to maintain traffic control systems would save SCDOT administrative costs.

Regarding cancellation reason A, the CPO finds no compelling evidence that the prices offered were truly excessive. Walker offered the State a price only slightly higher than the current state contract price for traffic controllers. However, the CPO finds no evidence that the decision to cancel the solicitation for reason A was arbitrary, capricious, clearly erroneous, or contrary to law. The CPO defers to the expertise of SCDOT to make that decision on traffic control safety devices in South Carolina.

As to cancellation reason B, the CPO also finds no basis to conclude that the determination to cancel the solicitation was arbitrary, capricious, clearly erroneous, or contrary to law. Compelling evidence was presented in this regard. A review of the probable awards under the protested solicitation reveals that the original bidding structure would result in numerous awards to various bidders. Of the twenty-one items bid, Walker was low bidder for four items (1, 3, 4, and 20); Temple, Inc. was the low bidder for six items (2, 9, 13, 14, 15, 16); Safetran was the low bidder for five items (5, 11, 14, 17, 18); and Control Technologies was the low bidder for seven items (6, 7, 8, 10, 12, 19, and 21).

Further, MMO has already proceeded with a new solicitation that restructures and revises the specifications to remove the requirement for installation of software and to provide for awards by entire lots, which evidences the State's intent to revise the specifications. [R. 19-445.2065(B)(1)(b)] Specifically, the following requirement was removed, "All Model 2070L Controllers shall have Naztec Apogee version 65.0Q or later Master/Local Controller firmware INSTALLED upon delivery," and the

Award Criteria was changed to "Award by Lot" rather than by item. See Ex. 1, p. 12 & 28; Exh. 9, p. 13 & 29.

In conclusion, under the standard of law established by the Code, the CPO finds no evidence that the determination to cancel the solicitation was arbitrary, capricious, clearly erroneous, or contrary to law in either regard. While it is unfortunate any time the State opens bids only to cancel the solicitation, the CPO is not convinced that MMO and SCDOT did not attempt to anticipate changes in a requirement prior to the date of opening and to notify all prospective bidders of any resulting modification or cancellation, thereby permitting bidders to change their bids and preventing the unnecessary exposure of bid prices.

Therefore, the protest is denied. MMO is directed to suspend the new solicitation until this protest is resolved.



R. Voight Shealy  
Chief Procurement Officer  
for Supplies and Services

October 23, 2009

Date

Columbia, S.C.



## STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

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Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: [www.procurementlaw.sc.gov](http://www.procurementlaw.sc.gov)

**FILE BY CLOSE OF BUSINESS:** Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

**FILING FEE:** Pursuant to Proviso 83.1 of the 2009 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410(4). . . . Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2008 S.C. Act No. 23, Part IB, § 83.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

**LEGAL REPRESENTATION:** In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).